

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

GARRICK HERRINGTON,)	No. CV-F-05-624 OWW/GSA P
)	
)	MEMORANDUM DECISION AND
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION FOR NEW TRIAL (Doc.
vs.)	145)
)	
A.K. SCRIBNER, et al.,)	
)	
Defendants.)	
)	
)	

On August 12, 2009, Plaintiff Garrick Herrington, proceeding *in pro per*, filed a motion for new trial pursuant to Rule 59, Federal Rules of Civil Procedure following a jury trial in which the jury found against him on all his claims.

Plaintiff's action pursuant to 42 U.S.C. § 1983, claimed that, while incarcerated at California State Prison Corcoran, Defendants Fuhlrodt, Hicks, Lowden and Wood violated his Eighth Amendment rights arising from a fall on a wet floor that occurred during a lockdown on May 5, 2004, and that Defendants Poulos, Scribner and Yamamoto violated his right to equal protection by

1 placing him on lockdown status because of his race, although the
2 curfew established the prison was on partial lockdown due to
3 incidents of racial violence. At trial, the Court granted
4 Defendants Fuhlrodt, Lowden and Poulos' motion for judgment under
5 Rule 50, Federal Rules of Civil Procedure, based on the absence
6 of evidence as to these defendant and entered judgment for these
7 Defendants as a matter of law. The jury returned a verdict in
8 favor of Defendants Hicks, Scribner, Wood and Yamamoto and
9 against Plaintiff.

10 A motion for new trial "may be granted to all or any of the
11 parties and on all or part of the issues ... for any of the
12 reasons for which new trials have heretofore been granted in
13 actions at law in the courts of the United States." Rule 59(a),
14 Federal Rules of Civil Procedure. "The grant of a new trial is
15 'confided almost entirely to the exercise of discretion on the
16 part of the trial court.'" *Murphy v. City of Long Beach*, 914 F.2d
17 183, 186 (9th Cir.1990). "A new trial may be ordered to correct
18 manifest errors of law or fact, but 'the burden of showing
19 harmful error rests on the party seeking the new trial.'" *Boston*
20 *Scientific Corp. v. Johnson & Johnson*, 550 F.Supp.2d 1102, 1110
21 (N.D.Cal.2008). "A motion for new trial may invoke the court's
22 discretion insofar as it is based on claims that 'the verdict is
23 against the weight of the evidence, that the damages are
24 excessive, or that, for other reasons, the trial was not fair to
25 [the] party moving; and may raise questions of law arising out of
26 alleged substantial errors in admission or rejection of evidence

1 or instructions to the jury.'" *Id.*, quoting *Montgomery Ward & Co.*
2 *v. Duncan*, 311 U.S. 243, 251 (1940).

3 Plaintiff asserts he is entitled to a new trial because the
4 Court abused its discretion in denying his repeated requests for
5 appointment of counsel to represent him in the prosecution of
6 this action.

7 As was ruled repeatedly in this action, Plaintiff does not
8 have a constitutional right to appointed counsel. *Rand v.*
9 *Rowland*, 113 F.3d 1520, 1525 (9th Cir.1997). The Court cannot
10 require an attorney to represent Plaintiff pursuant to 28 U.S.C.
11 § 1915(e)(1). *Mallard v. United States District Court for the*
12 *Southern District of Iowa*, 490 U.S. 296, 298 (1989). In certain
13 exceptional circumstances, the Court may request the voluntary
14 assistance of counsel pursuant to Section 1915(e)(1). *Rand*, 113
15 F.3d at 1525. Without a reasonable method of securing and
16 compensating counsel, the Court will seek volunteer counsel only
17 in the most serious and exceptional cases, by evaluating both the
18 likelihood of success on the merits and the ability of the
19 plaintiff to articulate his claims *pro se* in light to the
20 complexity of the legal issues involved. *Id.*

21 At trial, Plaintiff proved himself to be intelligent,
22 articulate, well-organized, and as a *pro se* advocate, the equal
23 of many licensed attorneys who appear before the Court. The
24 Court stated this on the record. He was able to present an
25 opening statement, effectively questioned witnesses, moved
26 exhibits into evidence, and gave a logical and persuasive closing

1 argument. Plaintiff was not prejudiced by the absence of
2 counsel.

3 Plaintiff's motion for a new trial on this ground is DENIED.
4 As demonstrated at the trial, the issues were not complex and
5 Plaintiff was well able to articulate his claims. Because
6 appointment of counsel is discretionary and the standard for
7 abuse of discretion high, Plaintiff has not demonstrated that the
8 Court's discretion was abused. Further, Plaintiff makes no
9 showing that voluntary counsel would have been available.

10 Plaintiff further asserts that he "requested that the Court
11 grant the appointment of an impartial expert and an impartial
12 industrial hygienist," but that this motion "was never addressed
13 by the Court during the time the case was switched from one
14 District Judge to another, then back again." Plaintiff
15 apparently refers to "Plaintiff's Request for Referral for
16 Voluntary Counsel and/or Appointment of Experts" filed on July
17 21, 2009, (Doc. 103), approximately one week before trial.
18 District Judge O'Neill denied this motion on July 22, 2009 (Doc.
19 109), but did not address the request for appointment of expert
20 witnesses.

21 Plaintiff's motion for new trial on this ground is DENIED.
22 Plaintiff did not make this request until the eve of trial
23 despite the fact that the case was pending for four years before
24 the trial. Nor is the court under a duty in a private civil
25 action to appoint an expert. Defendants did not call an expert.

26 Plaintiff contends he is entitled to a new trial because of

1 the Court's denial of Plaintiff's request for a continuance when
2 Plaintiff's medication was not transported to the Court by prison
3 officials. Plaintiff asserts that on the first day of trial,
4 July 28, 2009, after the jury was selected and dismissed by the
5 Court for the mid-day break, Plaintiff requested a continuance of
6 the trial until the following morning so that he might be taken
7 back to the Fresno County Jail for his pain medication, which had
8 not been transported with him. Plaintiff had filed a "Motion for
9 Order Directing Medication to Be Transported Court [sic] with
10 Plaintiff" on July 29, 2009, the second day of trial. Plaintiff
11 asserts that the Court denied his request for continuance and
12 then relied on the Deputy Attorney General representing the
13 defendants to check with jail authorities to ascertain whether
14 Plaintiff needed the pain medication. The Deputy Attorney
15 General spoke with the prison doctor who had prescribed
16 Plaintiff's medication and informed the Court that the doctor
17 stated that Plaintiff's missing his afternoon dosage would cause
18 Plaintiff some physical discomfort, but would not affect
19 Plaintiff's ability to think or concentrate.

20 Plaintiff asserts that it was error for the Court to rely on
21 the Deputy Attorney General, "who would naturally seek an
22 advantage," that the doctor had never examined Plaintiff or
23 reviewed his case, that Plaintiff made clear that the medication
24 was to be taken "as needed," and his examination of witnesses
25 after the mid-day recess "was unfocused and ineffective because
26 he was forced to suffer severe discomfort and pain." This is a

1 categorical misrepresentation. The court inquired whether Mr.
2 Harrington needed his meds and whether he could proceed.
3 Plaintiff stated he could do so. The Court ordered the DOC to
4 obtain and provide Plaintiff his meds and the next day of trial
5 Plaintiff confirmed HE HAD RECEIVED AND TAKEN HIS MEDS. The
6 subject was not mentioned again nor did Plaintiff ever say he was
7 affected in any way that interfered with his trial presentation.

8 Plaintiff's motion for new trial on this ground is DENIED.
9 Plaintiff demonstrated no difficulty during the afternoon session
10 on July 28, 2009 in presenting his case and, other than
11 expressing that he had some discomfort in his back and legs, did
12 not raise any further objection to continuing with the trial or
13 that he could not focus or concentrate because of his pain.
14 Plaintiff has not shown that he was prejudiced by the denial of
15 the continuance.

16 Plaintiff argues he is entitled to a new trial because of
17 the Court's endorsement of the Deputy Attorney General's request
18 that Plaintiff put on his prisoner witnesses first so that there
19 would be no need for other transportation orders. Plaintiff
20 asserts:

21 Although the Court made mention of not
22 wanting to prejudice the Plaintiff's case, in
23 the same sentence, the Court stated that it
24 would be helpful if this were to occur.
25 Plaintiff felt unduly swayed to acquiesce to
26 this request.

At the time, Plaintiff had requested, and
been denied, the earlier mentioned
continuance and did not want to draw the ire
of the Court. However, many of the

1 Defendants were eventually dismissed from the
2 case because they were never tied to
3 Plaintiff's claims. Plaintiff contends that
4 he had planned to cross-examine all of the
5 Defendants prior to calling any prisoner
6 witnesses. However, in order to please the
7 Court at the behest of the Deputy Attorney
8 General, Plaintiff felt that he had no choice
9 but too [sic] call prisoner witnesses well
10 prior to the time he had planned to.

11 Plaintiff's motion for new trial on this ground is DENIED.
12 The Deputy Attorney General asked the Court to inquire when
13 Plaintiff intended to call inmate witnesses Applin and Piazza to
14 the stand in order to avoid transportation of these witnesses on
15 the second day of trial and the expense of transporting these
16 witnesses. The Court advised Plaintiff that he could present his
17 case any way he wanted to and that he could call his witnesses in
18 any order he desired. Plaintiff did not call witness Piazza to
19 the stand until the second day of trial. Plaintiff was not
20 forced or coerced into calling his prisoner witnesses out of
21 order and he demonstrates no specific prejudice to him as a
22 result of his decision to call the prisoner witnesses first.
23 Plaintiff was afforded the opportunity and did call witnesses in
24 the order of his preference.

25 Plaintiff moves for a new trial on the ground that because
26 he was precluded from cross-examining Defendants Scribner and
Yamamoto about the E.O.P. program after Defendants' counsel had
opened the door. Plaintiff asserts:

At both re-directed examinations of these
Defendants, counsel elicited testimony
concerning an E.O.P. inmate who attempted
murder on staff during the relevant time of

1 the case. Plaintiff attempted to elicit on
2 re-cross examination the fact that other
3 inmates fell under the same remedial plan,
4 especially the inmate who was the initial
cause of the racially discriminatory lockdown
leading to Plaintiff's injury, but was
prohibited by the Court.

5 Plaintiff contends that the Court's ruling was improper:

6 Plaintiff sought to elicit admissions by both
7 of these Defendants that inmates are re-
8 classified from CCCMS, in the housing unit on
9 the facility and re-classified as E.O.P.
10 frequently. Specifically, Plaintiff sought
11 to show that the Defendants' claims of
isolation on the part of the E.O.P. program
was untrue and that it was merely a
classification of the Coleman v. Wilson
remedial plan, which the entire facility was
classified for.

12 Plaintiff does not know whether or not the
13 fact that this remedial plan is partially the
14 cause for this Court's federal 'takeover' of
15 the prison medical and mental health programs
16 was the reason for prohibiting such
questioning. However, the limiting of such
caused prejudice to Plaintiff's case while
giving the testimony an undue and artificial
veracity in the eyes of the jury.

17 As Defendants respond, the Court correctly ruled that
18 questions of Defendants Scribner and Yamamoto about the
19 classification of mental health (EOP and CCCMS) inmates was
20 irrelevant. Plaintiff's claim against Defendants Scribner and
21 Yamamoto was for racial discrimination. Plaintiff presented
22 evidence that Facility 3B, where Plaintiff was housed, was locked
23 down when a black inmate assaulted two officers in the visiting
24 room. Plaintiff argued that the lockdown was discriminatory
25 because Facility 3B was not locked down when a Hispanic EOP
26 inmate attacked a correctional officer in another housing unit of

1 the same facility. Yamamoto testified that Facility 3B was not
2 locked down because of the EOP inmate's assault because the
3 investigation revealed the Hispanic EOP inmate had a personal
4 grudge against the specific correctional officer and that the
5 assault was an isolated incident. Yamamoto and Scribner also
6 testified that EOP inmates, regardless of race, are usually
7 returned to normal programs faster than general population
8 inmates because of the mental health needs of the EOP inmates and
9 because EOP inmates are usually determined not to be involved in
10 conspiracies or riots. Plaintiff sought to elicit testimony on
11 re-cross examination about the different classifications of EOP
12 and CCCMS inmates, where they were housed, and what yards they
13 were allowed access to. After the Deputy Attorney General
14 objected on the grounds of relevance and beyond the scope of
15 direct examination, Plaintiff did not explain the connection
16 between the classifications and his race discrimination claim.
17 In his motion for new trial, Plaintiff again fails to show how
18 the classification of EOP inmates, application of *Coleman v.*
19 *Wilson*, or the appointment of a federal receiver is relevant to
20 his claim that Black inmates were treated differently from other
21 inmates during the lockdown from March to July 2004.

22 Plaintiff moves for a new trial on the ground that the
23 Court's answers to the jury's question during deliberations were
24 misleading.

25 The jury sent the following question to the Court during
26 deliberations:

1 What is a 'serious risk of injury.' Please
2 define.

3 Is the fact that the areas around all the
4 showers are always wet, constituting a
5 'serious risk of injury'?

6 Plaintiff asserts that the Court searched the Westlaw
7 database for the answer to the first question while stating to
8 the parties that the second question was the jury's job. After
9 not finding any decisional authority defining a "serious risk of
10 injury," the Court began to opine that the risk needed to be
11 known. Plaintiff argued that the Court's intent on instructing
12 the jury that the officer had to have some heightened and
13 specific knowledge would mislead the jury. Plaintiff cited
14 *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), as stating the
15 knowledge can be demonstrated by circumstantial evidence and that
16 factfinder may conclude that a prison official knew of a
17 substantial risk from the very fact that the risk was obvious.
18 Plaintiff asserts that evidence was presented that "the safe
19 working practices of the Defendants specifically acknowledged
20 that wet concrete floors are a substantial risk." Plaintiff
21 contends that the Court "assured Plaintiff that he would not give
22 such supplemental instruction and would merely answer the jury's
23 quesiton [sic]." Plaintiff asserts:

24 The Court began to instruct the jury
25 concerning the prison officials & requisite
26 need fro [sic] knowledge of the risk. The
 Court stated several times that the official
 'needed to know' that a substantial risk was
 present. This instruction, while emphasizing
 that the prison official had to know, gave a
 legally incorrect heightened knowledge

1 component to the case. Subsequently, the
2 Court's nonresponsive and misleading answer
3 to the jury's question caused them to veer
4 from the inferred debate of whether or not
5 the condition complained of posed a
6 'substantial risk of injury.'

7 At best the Court should have read the
8 correct language of 'substantial risk of
9 harm' to correct the 'serious risk of
10 hazard,' and stated that this is what the
11 jury was empaneled to decide alone. The
12 Court's personal view of some heightened
13 component of knowledge by the prison official
14 mislead [sic] the jury and caused sever [sic]
15 prejudice to Plaintiff [sic] case.

16 Defendants argue that, because Plaintiff's oral motion for a
17 new trial on this ground was denied, Plaintiff cannot again move
18 for a new trial but must move for relief from judgment or order
19 under Rule 60(b), Federal Rules of Civil Procedure.

20 However, a motion for new trial on the ground of
21 instructional error is appropriate. "[E]rroneous jury
22 instructions, as well as the failure to give adequate
23 instructions, are ... bases for a new trial." *Murphy v. City of*
24 *Long Beach, supra*, 914 F.2d at 187.

25 Plaintiff's motion for new trial on this ground is DENIED.
26 The jury's question did not, as Plaintiff contends, ask whether
knowledge of a substantial risk could be imputed or inferred.
The Court and counsel researched authorities to determine how
"serious risk" had been defined by case law. Neither the Court
nor counsel located a case where "serious risk" was defined in
the context of a physical condition on prison grounds. Under the
circumstances, the Court instructed the jury that it was for them

1 to determine whether the wet floor condition outside the shower
2 stall where Plaintiff fell amounted to a "substantial risk of
3 serious harm." The Court defined the terms "serious" and
4 "substantial" from a dictionary. The Court never referred to
5 "knowledge" or what knowledge had to be known or could be known
6 by prison officials.

7 Further, Defendants assert there was no evidence that the
8 wet floor outside the shower stall constituted a "substantial
9 risk." Hicks testified at trial that he was familiar with the
10 Code of Safe Practices identified in Plaintiff's Exhibit PX55.
11 The Code of Safe Practices stated that floors and walkways were
12 to be kept free of debris, water, and other slippery substances
13 and that wet floor signs were to be posted when mopping or spills
14 occurred. Defendants note that Plaintiff's Exhibit PX55 was not
15 introduced into evidence and that Hicks merely testified as to
16 his understanding of what the Code of Safe Practices meant.
17 Hicks did not testify that the wet walkway created a substantial
18 risk of harm. Therefore, Defendants argue, the Court properly
19 allowed the jury to determine whether the wet walkway near the
20 shower stall amounted to a "substantial risk of serious harm."

21 For the reasons stated:

22 Plaintiff's motion for a new trial is DENIED.

23
24 IT IS SO ORDERED.

25 Dated: September 25, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE